In The

Supreme Court of the United States

October Term, 1973

No. 73-5412

JOHN R. DILLARD, ETC.,

Appellant,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, ET AL.,

Appellee.

MOTION TO AFFIRM

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Appellees Industrial Commission of Virginia, et al., pursuant to Rule 16 of this Court, move that the final order and decree of the three-judge District Court for the Eastern District of Virginia herein appealed from the affirmed on the ground that the judgment of the court below is plainly right and the question does not require further argument.

ARGUMENT

This case involves a challenge to the constitutionality of Virginia's workmen's compensation laws insofar as those laws permit the termination of the benefits by an employer or insurer, on the ground of a change in the condition of the employee, prior to a full hearing by the Industrial Commission of Virginia on the merits of the application for termination. Specifically challenged is Rule 13 of the defendant Commission, promulgated in accordance with § 65.1-18 of the Code of Virginia (1950), as amended, which reads as follows:

> "Applications for Review of on Ground of Change in Condition.—Applications for review under § 65.1-99 of the Act must be in writing and state the ground relied upon for relief. Reviews of awards on the ground of a change in condition shall be determined as of the date of the filing of the application in the offices of the Commission, except as provided in paragraphs two and three hereof.
>
> "All applications for hearing by an employer or insurer under § 65.1-99 shall show the date through which compensation benefits have been paid. No application shall be considered by the Commission until all compensation under the outstanding award has been paid to the date such application is filed with the Commission. Except, that in any case in which the employee has actually returned to work or has refused employment (§ 65.1-63), medical attention (§ 65.1-88), or medical examination (§ 65.1-91), compensation may be terminated as of the date the employee returned to work or refused employment, medical attention or medical examination, or as of a date fourteen days prior to the date the application is filed, whichever is later. In such cases the application will be considered and determined as of the date of return to work, or refusal, or as of a date fourteen days prior to

the date the application is filed, whichever is later. *All applications by an employer or insurer shall be under oath and shall not be deemed filed and benefits shall not be suspended until the supporting evidence which constitutes a legal basis for changing the existing award shall have been reviewed by the Commission, or such of its employees as may be designated for that purpose, and a determination made that probable cause exists to believe that a change in condition has occurred.*

"All applications for hearing by an employee on the ground of further work incapacity shall be considered and determined as of the date incapacity for work actually begins, or as of a date fourteen days prior to the date the application is filed, whichever is later." (Emphasis supplied.)

The italicized language represents the text of an amendment to the Rule which became effective April 1, 1972. The effect of this amendment is to require the employer or insurer who wishes to suspend the payment of benefits pending a full hearing on the application to submit sufficient information to the Commission of the ultimate merit of the suspension that the possibility of fraudulent, frivolous or arbitrary suspensions is eliminiated and the likelihood of suspension in non-fraudulent but otherwise non-meritorious cases is minimized. It is appellees' position that this procedure provides adequate due process protection to both employer and employee, to the extent any such protection is required in workmen's compensation law, and that no other procedure short of the full hearing itself can practically provide this protection.

In essence, the relief sought by appellants is that Rule 13, rather than being declared void and unenforceable, be extended to require the continuation of benefits up to the time of the hearing (and presumably the determination) on

the employer's application. It will be seen that in the absence of Rule 13 there would be nothing to prevent the employer or insurer from unilaterally cutting off at any time. *Manchester Board & Paper Co., Inc.* v. *Parker,* 201 Va. 328, 111 S.E.2d 453 (1959).

It is true, as appellants point out, that the limits of procedural due process must be ascertained by balancing the possible "grievous loss" to the individual against the governmental interest in summary adjudication, and that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Goldberg* v. *Kelly,* 397 U.S. 254, 263, 90 S.Ct. 1011, 1018 (1970), citing *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 71 S.Ct. 624 (1951) and *Cafeteria & Restaurant Workers Union, etc.* v. *McElroy,* 367 U.S. 886, 81 S.Ct. 1743 (1961). It is not true, however, that the governmental interest in pre-hearing termination is that of saving time and administrative expense, nor is it true that the individuals whose payments may become temporarily terminated suffer the kind of "grievous loss" that would tip the balance in appellant's favor.

It will be quickly seen that the State has no interest at all in being able to summarily suspend benefits, because the State does not pay the benefits so it has none to suspend, summarily or otherwise. It is the *employer* who wants to suspend the benefits, not the State. This being so, it immediately follows that the State has no need to expend additional administrative resources to hold prior hearings, since it could simply choose to require the employer to continue payments up to the final adjudication if necessary. Secondly,

although this requirement would result in higher expenses to the employer and in return higher prices to the public, the maintenance of persons on workmen's compensation for longer than necessary might mean less unemployment and welfare payments which in turn means lower taxes to the public, so any alleged State interest in that regard is illusory. In any event, these are not the State's interests in the workmen's compensation plan.

To properly recognize the governmental interest involved here, it must be clearly understood that the funds being administered are not public funds but private funds representing payments made under a system provided by the State as a substitute for common-law tort litigation. Since the State has provided its citizens with this substitute for private litigation, it has a duty to *both* parties to see that they receive a fair shake. Indeed, at first glance it would seem that the employer-citizen is more entitled to due process than the employee-citizen. After all, workmen's compensation is voluntary only for the employee, not for the employer. §§ 65.1-103 et seq. The employer has no recourse against the employee for benefits wrongfully paid, § 65.1-99, while the employee can not only recover all benefits wrongfully suspended but can reduce his award to judgment and compel the resumption of benefits. § 65.1-100. See *Parrigen* v. *Long,* 145 Va. 637, 134 S.E. 562 (1926). Against these considerations, it does not seem at all inequitable to permit the employer to minimize unnecessary losses by pre-hearing termination where it appears likely that the application is made in good faith and based on substantial evidence. It should be noted at this point that in the other cases where pre-hearing termination is attempted, such as Social Security, unemployment, and welfare, the government is not only the "judge" of the rights of the

parties, it is also in fact one of the parties—the administrative "defendant" out of whose pocket the payments are made. Because no public funds are involved in workmen's compensation, however, this possibility of partiality of the "judge" toward one of the parties does not exist, and indeed it should be presumed that the Industrial Commission is entirely impartial as between the interests of the employers and the employees.

Examining now the private interest of the employee in avoiding pre-hearing termination—the claimed "brutal need"—it will be seen that there are significant differences between the needs of an individual receiving workmen's compensation, as here, and the needs of an individual receiving welfare payments as in *Goldberg* v. *Kelly, supra.* While it is true that the eligible worker is by definition unable to earn his usual wages because of some injury or disease, it is *not* true that he is also by definition destitute, as is a welfare recipient. The crucial factor, said this Court in *Goldberg,* is that pre-hearing termination "may deprive an eligible recipient of the very means by which to live while he waits." 397 U.S. at 264, 90 S.Ct. at 1018. Workmen's compensation recipients, by definition, have been employed prior to their illness or injury, while welfare recipients are, by definition, unemployed and perhaps unemployable. It is not unreasonable to assume that workmen's compensation recipients have savings or other independent resources, which welfare recipients are not likely to have, to tide them over the average one-month period between application and completion of review. It must not be forgotten that absolute termination without recourse is not being suggested here. What is in issue is the *temporary* suspension of benefits, with a full right of recovery, balanced against the employer's (and insurer's) interest in avoiding the loss of thou-

sands of dollars per week in undeserved payments for which there is no right of recovery. In striking this balance, defendants submit that this Court's recent affirmance of *Torres* v. *New York State Department of Labor,* 321 F.Supp. 432 (S.D. N.Y. 1971) *aff'd.* 405 U.S. 949 (1972) is significant. There the Court clearly rejected the minority argument based on *Goldberg* v. *Kelly,* and upheld the lower court's distinguishing of *Goldberg* from unemployment compensation cases, where, as here,

> ". . . the worse possible effect of the procedure which plaintiffs attack as being lacking in due process would be that for a period of a few weeks until a hearing is held a claimant who is finally determined to be eligible for payments would have to live on his accumulated havings or, if he had no savings, would have to resort to relief. If he is eventually found to be eligible he will receive retroactively all the payments to which he was entitled." *Torres* v. *N. Y. State Dept. of Labor,* 321 F. Supp. at 437.

The important consideration, which has apparently been recognized by this Court, is that persons who are likely to have independent resources do not stand on the same footing with welfare recipients when it comes to cutting off government benefits, let alone private compensation for tort injury.

Appellees submit that the "probable cause" prehearing determination provided for in Rule 13 as amended is therefore adequate to satisfy any requirement of due process based on a balancing of the various interests described above. This procedure, as stated, insures that an impartial reviewer will check each application to see that it is not fraudulent, frivolous, or otherwise unfounded. It cannot be said that the *ex parte* determination envisaged by the

Rule will result in unfair treatment of employees because the employer will always be able to substantiate his claim with some evidence. On the contrary, since there is still no evidence of what the Commission will require by way of substantiating evidence, it should be presumed that the Commission not only act fairly but will recognize the economic strength of the employer or insurer as opposed to that of the employee in scrutinizing such evidence. These are matters that it will take evidence of the Commission's actual practice to decide, which the plaintiffs have made no attempt to adduce in the year since this case was last before this Court. As the court below found,

> "Nowhere does the Rule say the determination may be made without notice to the employee and a chance to be heard. The mere fact that such an inference may exist—a determination without notice to the employee and an opportunity to be heard—does not render the language objectionable on its face. *Lindsey* v. *Normet*, 405 U.S. 56, 65. The amendment to the Rule is new and the evidence does not indicate what the Commission will require in the way of supporting evidence to constitute a legal basis for establishing probable cause to believe a change in condition has occurred." Memo opinion, pp. 8-9.

CONCLUSION

From the foregoing it is clear that the judgment of the District Court that under the facts and circumstances here involved the State function does not constitute a denial of due process is plainly right, based on the law and evidence, and hence this Motion to Affirm that judgment should be granted without further argument.

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CERTIFICATE OF SERVICE

I, Vann H. Lefcoe, a member of the Bar of the Supreme Court of the United States and counsel for the above named appellees, hereby certify that I have served three copies of the foregoing Motion to Affirm on John M. Levy, Esquire, 10 South Tenth Street, Richmond, Virginia 23219 and George S. Newman, Esquire, P.O. Box 417, Richmond, Virginia 23203, on or before October 10, 1973. All parties required to be served have been served.

VANN H. LEFCOE